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Rahmat Hidayat bin Dahnizar v Ooi Say Cheng

B HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 12B-141–09 OF 2013
WONG TECK MENG JC
30 JUNE 2015

C *Damages (Personal Injury or Death) — Personal injuries — Motor vehicle accident — Award of RM80,000 for head injury — Severe cerebral concussion, fracture skull, subdural haematoma, brain contusions and brain damage — Post-concussion syndrome — Impairment of mental functions — Risk of post-traumatic epilepsy — Award reasonable*

D

Tort — Negligence — Road accident — Appeal against decision of sessions court judge — Apportionment of liability — Appellant's motorcycle from opposite direction crossing respondent path resulting in accident — Respondent unable to describe how accident happened due to head injuries — Whether assessment of 100% liability correct based on police report and damage to respondent's motorcycle — Whether there was evidence from appellant to rebut respondent's case

E

This was an appeal against the decision of the sessions court judge ('SCJ') in deciding that the appellant was liable on the basis of 100% negligent for causing the accident between the respondent/plaintiff and the appellant/defendant. The respondent's motorcycle as for the awards for quantum, the appellant is only seriously challenging the award of RM80,000 given by the SCJ for the head injury suffered by the respondent. And the appellant's motorcycle had collided. The respondent was unable to remember how the accident happened due to his head injuries suffered in the accident. The appellant did not give evidence in court, nor was his police report tendered. As for the award for quantum, the appellant challenged the award of RM80,000 awarded for the head injury suffered by the respondent.

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Held, dismissing the appeal with costs of RM3,000:

(1) By considering the evidence adduced by the respondent, the accident happened on the correct side of the respondent's path and it was the appellant who had crossed the road to the right. The police report P13 of respondent also described how exactly the accident happened; that the appellant's motorcycle which was from the opposite direction crossed the path of the respondent which resulted in the accident. The damage to the respondent's motorcycle also proved that the accident happened while the respondent was travelling on a straight path (see para 8).

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(2) The mere fact that the respondent was unable to describe how the accident happened in his own words in court did not prevent the court from taking into consideration all the other available evidence adduced by the respondent to prove his case. On a balance of probabilities, the respondent had proven his case against the appellant for negligence. Hence, on the issue of liability, there was ample evidence on record to support the finding that the appellant was 100% negligent (see paras 9–10).

(3) The case of *Rubiah bte Anuar v Lim Sang* [1996] MLJU 369 applied since the particulars of the negligence of the defendant as itemised in the plaintiff's statement of claim stood unrebutted as the defendant took the perilous course by not attending and giving evidence at the trial. There was no evidence from the appellant to rebut the respondent's case as presented in court (see para 10).

(4) The respondent had sustained a severe cerebral concussion, fracture skull, subdural haematoma, brain contusions and brain damage. The respondent was diagnosed as suffering from symptoms of post-concussion syndrome consisting of emotional instability, irritability, inappropriate emotional response (laughing to non-provoking situations), lethargy and apathy (not mixing much with friends). He was also diagnosed to have some impairment of his mental functions which was due to the brain damage especially the left frontal and temporal lobes. The respondent also suffered weakness of the right shoulder abduction which was due to the damage to the frontal lobe. The respondent was at risk of post traumatic epilepsy in future. In view of the serious head injuries suffered by the respondent, the award of RM80,000 was reasonable and fair in the circumstances (see paras 12–13).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan hakim mahkamah sesyen ('HMS') dalam memutuskan bahawa perayu bertanggungjawab atas sebab 100% kecuaian kerana menyebabkan kemalangan antara responden/plaintif dan perayu/defendan. Motosikal responden sebagai award untuk kuantum, perayu hanya dengan serius mencabar award sebanyak RM80,000 yang diberikan oleh HMS untuk kecederaan kepala yang dialami oleh responden. Dan motosikal perayu telah bertembung. Responden tidak berupaya untuk mengingati bagaimana kemalangan itu berlaku disebabkan kecederaan di kepala yang dialaminya sewaktu kemalangan. Perayu tidak memberi keterangan dalam mahkamah, bahkan laporan polisnya tidak dikemukakan. Untuk award kuantum, perayu mencabar award sebanyak RM80,000 yang diawardkan untuk kecederaan kepala yang dialami oleh responden.

Diputuskan, menolak rayuan dengan kos sebanyak RM3,000:

(1) Dengan mempertimbangkan keterangan yang dikemukakan oleh responden, kemalangan yang berlaku di sebelah jalan betul responden dan adalah perayu yang telah melintas jalan ke kanan. Laporan polis P13 responden juga menggambarkan bagaimana kemalangan itu berlaku; bahawa motosikal perayu yang mana daripada arah bertentangan melintas jalan responden telah mengakibatkan kemalangan. Kerosakan motosikal responden juga membuktikan bahawa kemalangan berlaku sewaktu responden sedang melalui jalan yang lurus (lihat perenggan 8).

(2) Fakta bahawa responden tidak boleh menggambarkan bagaimana kemalangan berlaku dalam perkataannya sendiri dalam mahkamah tidak menghalang mahkamah daripada mempertimbangkan kesemua keterangan yang ada yang dikemukakan oleh responden untuk membuktikan kesnya. Dalam imbangan kebarangkalian, responden telah membuktikan kesnya terhadap perayu terhadap kecuaian. Maka, pada isu liabiliti, terdapat keterangan yang mencukupi pada laporan untuk menyokong dapatan bahawa perayu adalah 100% cuai (lihat perenggan 9–10).

(3) Kes *Rubiah bte Anuar v Lim Sang* [1996] MLJU 369 diguna pakai memandangkan butiran kecuaian defendan dibutirkan di dalam penyata tuntutan plaintif kekal tidak dipatahkan oleh kerana defendan mengambil jalan khianat dengan tidak hadir dan memberikan keterangan di perbicaraan. Tiada keterangan daripada perayu untuk mematahkan kes responden seperti yang dikemukakan di mahkamah (lihat perenggan 10).

(4) Responden telah mengalami gegaran serebrum yang teruk, keretakan tengkorak, hematoma subdural, kontusi otak dan kerosakan otak. Responden telah didiagnosis sebagai mengalami tanda-tanda sindrom selepas gegaran yang terdiri daripada ketidakstabilan emosi, cepat marah, tindak balas emosi yang tidak sesuai (ketawa kepada situasi bukan provokasi), letargi dan kelesuan (tidak bercampur dengan rakan-rakan). Dia juga didiagnoskan mempunyai beberapa kemerosotan fungsi mental yang disebabkan oleh kerosakan otak terutamanya di bahagian depan kiri dan cuping temporal. Responden juga mengalami kelemahan pemelarian bahu kanan yang mana disebabkan oleh kerosakan bahagian hadapan cuping. Responden berisiko terhadap epilepsi post trauma pada masa depan. Memandangkan kecederaan kepala yang serius yang dialami oleh responden, award sebanyak RM80,000 adalah munasabah dan adil dalam keadaan itu (lihat perenggan 12–13).]

Notes

For cases on personal injuries in general, see 6(1) *Mallal's Digest* (5th Ed, 2015) paras 669–1059.

For cases on road accident, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 1790–2092.

Cases referred to

Mohd Shuhada B Abdul Rashid @ Mamat v Md Razali B Ismail & Anor [2013] 1 PIR [15], Sc (refd)
Murugan v Lew Chu Cheong [1980] 2 MLJ 139, FC (refd)
Rubiah bte Anuar v Lim Sang [1996] MLJU 369; [1998] 3 CLJ Supp 314, HC (folld)
Topaiwah v Salleh [1968] 1 MLJ 284, FC (refd)

Legislation referred to

Joshua Narendran (Ajmer, Sandhu & Ong) for the appellant.
Baljit Singh (Baljit Singh & Co) for the respondent.

Wong Teck Meng JC:

[1] This is an appeal against the decision of the sessions court judge in deciding that the appellant was liable on the basis of 100% negligent for causing the accident between the respondent/plaintiff and the appellant/defendant.

[2] The respondent was riding a motorcycle bearing registration No PFP 8084, whereas the appellant was riding a motorcycle bearing registration No PFG 1439. It is not disputed that the accident happened on Jalan Jelutong, Penang.

[3] According to the investigating officer SP3, Sergeant Nordin bin Mat, the respondent's motorcycle was travelling from top to the bottom of the sketch plan P2. The appellant's direction travel was from bottom to top of P2 and was turning to Maybank which was on the right side of the said road.

[4] According to SP3 the damage to the respondent's motorcycle was on the front. The appellant did not bring his motorcycle to the police station for investigation. From P2, it is quite clear that vehicles from the bottom to the top could turn to the right side of the road. According to SP3, the respondent had lodged a report P13 and had met him after the said P13 was lodged.

[5] There was a witness SP1 Ooi Shyh Jiah who went to the scene of the accident on 14 November 2010 soon after the accident occurred. SP1 is the elder brother of SP4 Ooi Say Cheng ('the respondent'). At the scene of the accident, SP1 saw the respondent's motorcycle lying on the yellow box on the

respondent's side of the road and he marked X on P2 which is on the path of the respondent's travel.

[6] As for the respondent SP4, it was unfortunate that he was unable to remember how the accident happened on 14 November 2010 when he gave evidence in court on 29 July 2013. SP4's head injuries must have caused his memory of the accident to fail. SP4 testified that he made a police report P13 and remembered that the accident was in the yellow box of the road.

[7] According to SP4, he was informed by others that the accident was in the yellow box of the road. The appellant did not give evidence in court, nor was his police report tendered. His police report was merely identified as IDD7 through SP3.

[8] By considering the evidence adduced by the respondent, the accident happened on the correct side of the respondent's path and it was the appellant who had crossed the road to the right. The accident happened at X on P2. The police report P13 of respondent also described how exactly the accident happened that is the appellant's motorcycle which was from the opposite direction crossed the path of the respondent which resulted in the accident. The damage to the respondent's motorcycle also proved that the accident happened while the respondent was travelling on a straight path.

[9] Hence, the mere fact that the respondent was unable to describe how the accident happened in his own words in court does not prevent the court from taking into consideration all the other available evidence adduced by the respondent to prove his case. On a balance of probabilities, the respondent had proven his case against the appellant for negligence.

[10] Hence, on the issue of liability, there is ample evidence on record to support the finding of the sessions court judge that the appellant was 100% negligent. The case of *Rubiah bte Anuar v Lim Sang* [1996] MLJU 369; [1998] 3 CLJ Supp 314 applies where the particulars of the negligence of the defendant as itemised in the plaintiff's statement of claim stood unrebutted since the defendant took the perilous course by not attending and giving evidence at the trial. Hence, there was no evidence from the appellant to rebut the respondent's case as presented in court.

[11] Therefore, the appellant failed to establish that there was any error of fact or law or that there was a misdirection of himself by the sessions court judge to warrant a revision of his decision (see *Murugan v Lew Chu Cheong* [1980] 2 MLJ 139 (FC)). I therefore, affirmed the decision of the sessions court judge on his finding on liability in this case.

[12] As for the awards for quantum, the appellant is only seriously challenging the award of RM80,000 given by the sessions court judge for the head injury suffered by the respondent. Several specialist reports were referred to the court. The rest of the quantum is not contested and/or agreed upon. The latest report of Gleneagles Medical Centre dated 15 March 2012 stated that the respondent had sustained a severe cerebral concussion, fracture skull, subdural haematoma, brain contusions and brain damage.

[13] The respondent was diagnosed as suffering from symptoms of post-concussion syndrome consisting of emotional instability, irritability, inappropriate emotional response (laughing to non-provoking situations), lethargy and apathy (does not mix much with friends). He was also diagnosed to have some impairment of his mental functions which was due to the brain damage especially the left frontal and temporal lobes. The respondent also suffered weakness of the right shoulder abduction which was due to the damage to the frontal lobe. The respondent is at risk of post traumatic epilepsy in future.

[14] Having considered the serious head injuries suffered by the respondent, I am of the view that the award of RM80,000 given by the sessions court judge is reasonable and fair in the circumstances. The appellant's submission that for this award, the proper award should be RM50,000 based on the case of *Mohd Shuhada B Abdul Rashid @ Mamat v Md Razali B Ismail & Anor* [2013] 1 PIR [15] where the sessions court there awarded RM55,000 for mild head injury with residuals such as behavioral symptoms ie increased irritably, temper tantrums, easy fatigability, lost of drive and initiative and impaired sleep pattern, cognitive deficit (impairment of immediate recall, mild impairment of delayed visual recall, some degree of impaired information processing speed, impaired executive function and shortened attention span) and subjective symptoms (headaches vertigo) which are not as severe as the residuals suffered by the respondent in the present case here. Thus, the appellant's suggestion of RM50,000 as the correct award is inappropriate as it is on the low side.

[15] The Federal Court case of *Topaiwah v Salleh* [1968] 1 MLJ 284 held that, 'the Federal Court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled. The assessments which the courts have made over the years form some guide to the kind of figure which is proper and which the Federal Court will follow in the light of the special facts of each

particular case'. The award given was not so extremely high in order for me to interfere with it by substituting it with a lower amount.

[16] Accordingly, I dismissed the appeal with costs of RM3,000.

Appeal dismissed with costs of RM3,000.

Reported by Kanesh Sundrum